

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

Michael D. Webb,	:	Case No. 1:98-CV-766
	:	
Petitioner,	:	District Judge Susan J. Dlott
	:	
v.	:	Magistrate Judge Michael R. Merz
	:	
Betty Mitchell, Warden,	:	ORDER ADOPTING REPORT AND
	:	RECOMMENDATIONS IN PART
Respondent.	:	AND SUSTAINING OBJECTIONS IN
	:	PART; CERTIFICATE OF
	:	APPEALABILITY GRANTED

This matter is before the Court on the Report and Recommendations on Motion for Certificate of Appealability (“Appealability R&R”) (doc. 102), Petitioner Michael D. Webb’s Objections to the Appealability R&R (doc. 104), and the Warden’s Response to Petitioner Webb’s Objections (doc. 105).

In the Appealability R&R, Chief Magistrate Judge Merz recommended granting a certificate of appealability to Petitioner Webb on the First, Second, Fourth, Sixth, Eighth, and Twelfth Causes of Action and denying a certificate of appealability as to the Fifth, Tenth, and Fifteenth Causes of Action. The Warden does not object to the Chief Magistrate Judge’s recommendation to grant the certificate of appealability as to the First, Second, Fourth, Sixth, Eighth, and Twelfth Causes of Action. The Warden’s failure to object waives his right to an appeal and the Court may adopt this portion of the Appealability R&R without further review. See Thomas v. Arn, 474 U.S. 140, 145-50 (1985) (upholding Sixth Circuit waiver rule); Paige v. Bradshaw, No. 1:05-CV-2618, 2007 WL 3287329, at \*1 (N.D. Ohio 2007). The Court, therefore, adopts the Appealability R&R as to the issuance of a certificate of appealability for the

First, Second, Fourth, Sixth, Eighth, and Twelfth Causes of Action.

Petitioner Webb has objected to the Chief Magistrate Judge's recommendation to deny a certificate of appealability as to the Fifth, Tenth, and Fifteenth Causes of Action. The Court has considered the issues *de novo* pursuant to Federal Rule of Civil Procedure 72(b). The Court adopts the reasoning and recommendation of the Chief Magistrate Judge as to the Fifth and Tenth Causes of Action. As to the Fifteenth Cause of Action, however, the Court will not adopt the recommendation of the Chief Magistrate Judge. The Court finds that reasonable jurists would find it debatable whether the retroactive application of the Jenks<sup>1</sup> rule violated Petitioner Webb's due process rights and thus whether the Ohio Supreme Court's decision on Webb's direct appeal was contrary to or an unreasonable application of the clearly established federal law stated in Bouie v. City of Columbia, 378 U.S. 347 (1964), and Rogers v. Tennessee, 532 U.S. 451 (2001).

For the foregoing reasons, the Appealability R&R (doc. 102) is **ADOPTED IN PART** and Petitioner Michael D. Webb's Objections to the Appealability R&R (doc. 104) are **SUSTAINED IN PART**. The Court **ORDERS** that a certificate of appealability **IS GRANTED** as to the First, Second, Fourth, Sixth, Eighth, Twelfth and Fifteenth Causes of Action only.

IT IS SO ORDERED.

S/Susan J. Dlott

Susan J. Dlott

United States District Judge

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<sup>1</sup> Ohio v. Jenks, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991).